82-1656



IN THE

SUPREME COURT OF THE UNITED STATES

---

OCTOBER TERM, 1982
NO.

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CAROLYN MC KENDRICK

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

Respondent

PETITION FOR WRIT OF CERTIORARI ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

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## QUESTIONS PRESENTED

Whether reference made numerous times during direct testimony of a Prosecution witness to his taking a lie detector test and the results of said test in the absence of a proper curative instruction by the trial judge, is violative of the Petitioner's Sixth Amendment right to be confronted with the witnesses against him.

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TO: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

The Petitioner, CAROLYN MC KENDRICK, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case on December 20, 1982.

## CITATION TO OPINIONS BELOW

The opinion of the Court of Common Pleas appears in the appendix, and is unreported. There is no opinion of the Supreme Court of Pennsylvania but its judgment order appears in the Appendix and is unreported.

## JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on December 20, 1982. The jursidction of this Court is invoked under 28 U.S.C. section 1257 (3).

## QUESTIONS PRESENTED

Whether reference made numerous times during direct testimony of a Prosecution witness to his taking a lie detector test and the results of said test in the absence of a proper curative instruction by the trial judge, is violative of the Petitioner's Sixth Amendment right to be confronted with the witnesses against him.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district. Wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

## STATEMENT OF THE CASE

The Petitioner in this case is Carolyn Mc Kendrick. The Respondent is the Commonwealth of Pennsylvania.

This Petition for certiorari arises out of the conviction of Petitioner, Carolyn Mc Kendrick, for third degree murder and a related weapons offense following a jury trial in the Court of Common Pleas, Philadelphia County, the Honorable Robert A. Latrone, presiding.

The facts surrounding this conviction begin on May 26, 1977. On that date, a shooting occurred at 2710 Federal Street, Philadelphia, Pennsylvania, the petitioner's residence. The decedent, Tyrone Everett, who was the defendant's boyfriend, was a part-time resident at her house. They had been "going together" for approximately 1 1/2 years at the time of his death. Their relationship had been fraught with beatings and violence and several witnesses, both Commonwealth and defense, testified as to the severity of the prior beatings of defendant by decedent. Ms. McKendrick who admitted shooting decedent, pled self-defense to the killing.

In addition to decedent, two other persons eyewitnessed the actual event; Tyrone Price, a Commonwealth witness, and the Petitioner, Carolyn McKendrick who testified in her own defense.

The issue presented before Your Honorable Court arose during the course of Mr. Price's direct testimony after Mr. Price had told the jury his version of the shooting, which was very damaging to the Petitioner's plea for self defense. The eyewitness testimony was obviously very damaging to Ms. McKendrick's plea of self-defense and whether the jury believed Mr. Price or Ms. McKendrick was crucial to the outcome of the trial.

After the damaging testimony, the Commonwealth questioned its witness with regard to several inconsistent prior statements. Although Mr. Price had admitted being present and witnessing the shooting at trial, the Commonwealth read a statement taken on May 27, 1977, approximately six months prior to the trial, whereby Mr. Price denied any knowledge of how the death of decedent had occurred. When asked by the Commonwealth if the statement was true, Mr. Price replied "The machine says I wasn't telling the truth". An objection and motion for mistrial were made by the defendant and thereafter denied by the Court. Thereafter, the prosecutor asked Mr. Price to identify Exhibit C-35 and the witness stated that the statement was "the second test I took". Again an objection was made and defense counsel requested that the testimony be stricken. Although the objection was sustained the jury was not instructed to strike it from their memory. The third inconsistent statement was then read to the jury. In this statement the witness admitted being present at the time of the shooting, but denied knowledge of drugs on the premises when asked if the statement was

true, the witness replied "No. The machine said it was untrue". Once again, the Court denied defense counsel's request for a mistrial and the Court sua sponte instructed the jury as follows.

> "The obvious reference - obviously the machine would be a lie detector test. Your are to disregard any reference to a lie-detector test. You judge this witness' credibility or believability or lack of believability, which is in your sole discretion, from what you are hearing and watching as he is testifying.
>
> You are the truth determiners, not any testing.
>
> As to the reference by the witness, the witness doesn't know the admissible from the inadmissible. The witness is as you all are, a layman. Don't derive any prejudicial reference as the result of his testimony."

After the close of the Commonwealth's case, Ms. McKendrick took the stand and told her version of what had transpired. After hearing both versions, defendant was convicted of third degree murder and thereafter sentenced to 5-10 years imprisonment to run concurrently with a lesser weapons offense. Post-trial motions involving this issue presented for writ of certiorari were rasied and denied by the Lower Court. An appeal was taken to the Supreme Court of Pennsylvania. Said appeal was denied on December 20, 1982.

REASONS FOR GRANTING THE WRIT

It is submitted before Your Honorable Court that the trial Court erred in denying the Petitioner's motions for mistrial and in informing the jury that the test Mr. Price referred to was, in fact, a polygraph examination. Once informed that Mr. Price's version of what had transpired has been scrutinized by a lie detector test, the jury should have been withdrawn, at defendant's request.

The trial judge's sua sponte instruction was ineffective to cure the prejudicial error that had resulted and moreover, served to buttress this error. The judge's sua sponte instruction succeeded in bringing home to the jury the nature of "this machine" and its purpose. As a "lie detector", something a layman juror probably would not have comprehended but for this instruction. The instruction noted the purpose and function of the machine, and further noted that the jury should not have heard such testimony. Most importantly, however the instruction failed to mention why such results were and still are inadmissible in evidence.

In Pennsylvania, it is well established that the result of a lie detector test are inadmissible when offered into evidence for the purpose of establishing the guilt or innocence of one accused of a crime, regardless of whether the accused or the prosecutor seeks

its introduction. Commonwealth v. McKinley, 181, Pa. Super 610, 123 A.2d 735 (1956). The rationale for this exclusion is that the lie detector has not yet attained scientific acceptance as a reliable and accurate means of ascertaining truth or deception. McKinley, supra, Commonwealth v. Pfender, _____ Pa. _____, 421 A.2d 791 (1980), Commonwealth v. Gee, 467 Pa. 123, 354 A.2d 875 (1976). Thus the Courts of this Commonwealth have consistently refused to recognize the scientific accuracy or validity of such a test. Commonwealth v. Cain, 471 Pa. 140, 369 A.2d 1234 (1977).

If the results of a lie detector test are admitted into evidence, reversible error is committed and a new trial must be granted. Commonwealth v. Banmiller, 194 Pa. Super. 448, 169 A.2d 347 (1961). Even if the results of a lie detector test are impliedly conveyed to the jury, the damage cannot be cured by a cautionary instruction. Commonwealth v. Camm, 443 Pa. 253, 277 A.2d 325 (1971).

The Commonwealth of Pennsylvania is not alone in its decision to exclude references to polygraph examinations at trial. See Marks v. United States, 260 F.2d 377 (10th Cir. 1958). Frye v. United States, 544 App. D.C. 46, 293 F.1013 (1923), Sodavy v. Fay, 189 F. Supp. 150 (S.D.N.Y. 1960), People v. Baney, 28 111.2d 505, 192 N.E. 2d 920 (1963), State v. Bohner, 210 Wisc. 651, 246 N.W. 314 (1933). A Court must always be alert to prevent the use of evidence that has marginal

utility in the process of truth seeking if it is of such a nature as to impress the jury. United States v. Ridling, 350, F. Supp. 90, 95 (E.D. Mich. 1972)

Thus, in the case at bar, grave prejudice to the Petitioner resulted when the jury, knowing it was privileged to hear something it shouldn't have, was never informed that the test's unreliability was what should have kept those results from them. The obvious implication to the jury that the witness failed the tests was that eventially he told the truth, passed the tests, and gave consistent statements which were also admitted over defendant's objection on redirect. Of course, these later statements were consistent with the witness' testimony at trial.

It is Petitioner's contention that the inadmissible reference to the results of the lie detector test by the Commonwealth's only eyewitness was violative of the confrontation clause of the Sixth Amendment. The Sixth Amendment provides in pertinent part that:

> "In all criminal prosecutions the accused shall enjoy the right.... to be confronted with the witness against him."

This right was first made applicable to the States in the case of Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065 (1965). Although the intended purpose of this right is not entirely clear, the Supreme Court

opinion in the case of California vs. Green, 399 U.S. 149, 90 S.Ct.1930 (1970) sheds some light on the purpose behind the adoption of this protection. In Green, the Court wrote :

> "The particular vice which gave impetus to the confrontation [clause] was the practive of trying defendant on 'evidence' which consisted solely of ex parte affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact." Id. 90 S.Ct. at 1934.

The Supreme Court in Green went on to state that the right of confrontation serves three purposes. First, it insures that statements made by the witnesses are under oath. Secondly, it forces the witness to submit to cross-examination. Lastly, it permits the jury to observe the demeanor of the witness which presumably will and in assessing credibility. Id.

In the case currently presented for Writ of Certiorari, the Petitioner submits that she denied an opportunity to effectively "confront" the witness against her at her trial Insofar as the trial judge denied all of defense counsel's motionf for a mistrial following damaging references by the chief prosecution witness to polygraph examinations, as well as the fact that the Lower Court

issued a cautionary instruction to disregard the eyewitness' testimony sua sponte to the jury which clarified the purpose and function of the lie detector machine, Petitioner was estopped from fully cross-examining the witness.

By the trial judge instructing the jury to disregard any reference to a lie-detector test, he closed the door to any further questioning by the Petitioner of the witness' testimony. Consequently, the Petitioner did not receive the protection of the confrontation clause enunciated in California v. Green. The trial judge, in his cautionary instruction to the jury, essentially forbade any further examination into the area concerning Mr. Price's polygraph examination. Thus, no opportunity was afforded the Petitioner at trial to ascertain whether the polygraph was taken by Mr. Price under any oath. No cross-examination could thus be conducted as to the actual lie detector testing conditions, where it was done, by whom it was conducted, and the certification of results. Moreover the jury as layman probably reasoned that if Mr. Price failed the polygraph test, prior to trial when he gave different statements than those proffered into evidence at trial, then especially, his statements at trial were the truth. Due to the inability of defense counsel to question him on this alleged polygraph examination, the jury was denied an opportunity to observe the demeanor of the witness and assess his credibility as to the veracity of his allegations regarding the lie detector test.

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Davis v. Alaska, ____ U.S.____, 94 S.Ct. 1105 (1974) ....[The] cross-examiner is permitted to delve into the witness' story to test the witness' perceptions and memory.

Pennsylvania case law mandated that the trial judge grant a new trial once reference was made to the polygraph machine insofar as an inference was made that an actual test certified the truth of testimony implicating the accused, when in fact that evidence was unreliable. (See Commonwealth v. Johnson, 441 Pa. 237, 272 A.2d 467 (1971).

However, in denying the motion for mistrial and giving a cautionary instruction, the Trial Judge erroneously limited the scope of Petitioner's cross-examination, denying her a valuable Sixth Amendment right, despite the fact that the prosecution had "opened the door" on direct for such cross-examination. The case law is clear that a limitation which prevents cross-examination in an area, which is properly subject to cross-examination, does constitute reversible error. United States v. Jorgenson, 451 F.2d 516, 519-20 (10th Cir. 1971), cert den. 405 U.S. 922 92 S. Ct. 959. The characteristic feature in this situation to the complete denial of access to an area which is properly the subject of cross-examination. Id. Unless an accused is afforded reasonable latitude in examining witnesses against him, he is

effectively denied his right of confrontation. State v. Temple, 485, P.2d 93,96 (1971).

Ms. Mc Kendrick was thus denied her Sixth Amendment right to confront all witnesses against her, insofar as she was completely denied the opportunity to cross-examine Tyrone Price as to his polygraph examination; this examination was a proper subject for inquiry because the Prosecution had "opened the door" for said inquiry on direct examination. She was most assuredly prejudiced by this denial as Mr. Price was the only other eyewitness to the crime, besides herself.

CONCLUSION

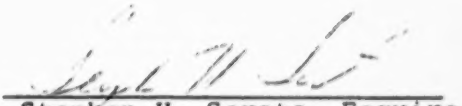
For these reasons, a Writ of Certiorari should issue to review the judgment of the Supreme Court of Pennsylvania.

Respectfully submitted,

STEPHEN H. SEROTA, Esquire
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this day of February, 1983, three copies of the Petition for Writ of Certiorari were hand-delivered to the Honorable Robert A. Latrone and all other parties that are required to be served.



Stephen H. Serota, Esquire

Suite 400
21 S. 12th Street
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Fenruary 18, 1983

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

PHILADELPHIA COUNTY

TRIAL DIVISION - CRIMINAL SECTION

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA | : | SUPREME COURT NO. 256 |
| | : | |
| v. | : | JANUARY, 1979 |
| | : | |
| CAROLYN McKENDRICK | : | Appeals from the Judgments of |
| | : | Sentence of the Court of |
| | : | Common Pleas of Philadelphia |
| | : | June Term, 1977, Nos. 1205, 1208 |
| | : | |
| | : | ENTERED: June 26, 1979 |

OPINION

LATRONE, J. FILED: JANUARY 18, 1982

Carolyn McKendrick, the defendant, was charged with a criminal homicide and related weapons offenses resulting from her "love-nest" shooting of Tyrone Everett, a South Philadelphia pugilist of national renown, in the second floor front bedroom of her residence at 2710 Federal Street here in Philadelphia at about 11:00 o'clock a.m. on May 26, 1977. Following a trial before this Court sitting with a jury, McKendrick was convicted of murder of the third degree and possession of an instrument of crime. A jury verdict of not guilty was returned on a separate criminal information charging possession of a controlled substance with intent to manufacture or deliver which resulted from police confiscation of two bundles of heroin at the McKendrick residence shortly after the fatal shooting. Prior to trial, without objection from

defense counsel, the Commonwealth elected not to proceed on a fourth and last criminal information covering the charge of involuntary manslaughter. Since this Court nol prossed this charge of involuntary manslaughter on the Commonwealth's motion following the trial, it is now reminded that it is forever barred from future prosecution of this charge which arose from the same conduct or resulted from the identical criminal episode or transaction. Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432 (1973) (Campana I) and Campana II, 455 Pa. 622, 314 A.2d 854 (1974); Commonwealth v. Tarver, 467 Pa. 401, 357 A.2d 539 (1976); Commonwealth v. Holmes, 480 Pa. 536, 391 A.2d 1015 (1978); Commonwealth v. Edwards, 264 Pa. Super. 223, 399 A.2d 747 (1979); Section 110 of the Crimes Code, 18 Pa.C.S.A. §110 (effective June 6, 1973).

Post-verdict motions were filed, argued, and denied. This Court imposed concurrent sentences of 5 to 10 years and 2-1/2 to 5 years for McKendrick's convictions of murder of the third degree and possession of an instrument of crime. The instant appeals are from these judgments of sentence. In compliance with the requirements of Pa.R.A.P. 906(2), this Court has received copies of Notices of Appeal from these sentences to both the Supreme and Superior Courts of Pennsylvania. It is assumed that defense counsel subsequently effected a consolidation of such appeals. See, Pa.R.A.P. 513; Appellate Court Jurisdiction Act, Act of July 31, 1970, P.L. 673, No. 223, Act. V, §503(c), 17 P.S. §211.503(c) (1979-1980 Pocket Part.)

Despite the fact that McKendrick's attorney filed the required written post-verdict motions, it is submitted that only the following designated grounds have been preserved for appellate consideration by the Pennsylvania Supreme Court:

(1) that the trial Court erred in its denial of a defense motion for a mistrial when Doris Everett, deceased's mother, testified as a Commonwealth witness that Ricardo McKendrick, defendant's husband, had made contractual agreements with third persons to have the deceased killed;

(2) that the trial Court erred in its denial of a defense motion for a mistrial when Doris Everett, deceased's mother, also testified as a Commonwealth witness that Ricardo McKendrick, defendant's husband, had previously been incarcerated for his conviction of criminal acts;

(3) that the trial Court erred in denying defense motions for mistrial when Teri Price, a Commonwealth witness, made testimonial references to having been administered lie detector tests by the police during his period of custodial interrogation;

(4) that the Court committed reversible error in allowing the Commonwealth to introduce evidence of prior consistent statements made by Teri Price, a Commonwealth witness in its case-in-chief, in order to rehabilitate his credibility as a witness;

(5) that the trial Court erred in its denial of a motion for mistrial when a court clerk, then presented as a rebuttal witness for the purpose of introduction of impeachment

evidence concerning defendant's prior conviction for relevant criminal acts, erroneously testified from an extract of criminal record that the defendant had a prior conviction for the charge of possession of a firearm with a defaced serial number;

(6) that the trial Court erred in admitting evidence of defendant's prior convictions of the charge of receiving stolen goods in order to impeach her credibility as a witness;

(7) that the trial Court erred in its ruling that a .30 caliber Ruger six shooter was admissible as relevant physical evidence, although it was not identified as the identical murder weapon;

(8) that the trial Court erred in its ruling that Police Officer Maroney could not offer testimony pertaining to alleged beatings inflicted upon Christine Smalls by Tyrone Everett, the deceased, in order to establish that the instant killing was perpetrated by the defendant in self-defense of her person;

(9) that the trial Court erred in ruling as inadmissible certain portions of defendant's hospital records which explained her treatment for relevant personal injuries, but which likewise contained hearsay statements to the attending physician explaining how she had been injured;

(10) that the trial Court erred in denying a defense motion for mistrial made in response to the District Attorney's prejudicial and inflammatory comments in closing argument, "That's no plaything. Remember the good times," since such statements deprived the defendant of a fair and impartial trial;

(11) the trial Court erred in denial of motions for mistrial at various trial junctures at which the District Attorney made prejudicial and inflammatory references to defendant's well-furnished home, wearing apparel, possession of large quantities of clothing and shoes, and adulterous relationship with the deceased;

(12) that the record contained insufficient evidence to support the defendant's convictions of the charge of murder of the third degree and possession of an instrument of crime.[1]

Immediately hereafter, each of these twelve assignments of error will be addressed and analyzed seriatim, and since all of them are meritless, it is submitted that this Court properly entered its Order denying post-verdict motions.

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1. As required under Pa.R.Crim.P. 1123(a), defense counsel filed formal written post-verdict motions within the required ten-day period after jury verdict. The first three paragraphs of these original written motions consisted of "boiler-plate" allegations amounting to a sufficiency challenge to the evidence supporting McKendrick's convictions; in toto, these motions also contained sixteen grounds in addition to this sufficiency challenge. Thus, the original motions contained allegations in nineteen paragraphs. As is the common and acceptable practice here in the First Judicial District, the closing paragraphs of these initial written motions contained a recital that the defendant reserves the right to file additional reasons after receipt of a copy of the notes of trial testimony. In fact, after receiving a copy of the transcript of trial testimony, defense counsel submitted "Additional Motions For New Trial And An Arrest Of Judgment" which added seven additional reasons to those already set forth in his initial written motions.

It is important to note that only twelve of the reasons included in original and additional written post-verdict motions were briefed and advanced by defense counsel at the time of subsequently conducted oral argument. Exclusive of the eleven grounds which were neither argued nor briefed before it at the post-verdict juncture, this Court considered and evaluated the remaining twelve grounds set forth above which had been filed in written form of post-verdict motions. It is submitted that this Court's consideration of the remaining twelve reasons which are set forth above,

(Footnote No. 1 is continued on Page 6.)

I.

McKendrick's first assignment of error pertains to this Court's refusal to grant motions for mistrial in two separate instances in which Doris Everett, deceased's mother, while

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(Footnote No.1 is continued.)

exclusive of the eleven grounds which were neither briefed nor argued, preserves them for appellate review. See generally, Commonwealth v. Blair, 460 Pa. 31, 331 A.2d 213 (1975); Commonwealth v. Hilton, 461 Pa. 93, 334 A.2d 643 (1975); Commonwealth v. Terry, 462 Pa. 595, 342 A.2d 92 (1975); Commonwealth v. Fortune, 464 Pa. 367, 346 A.2d 783 (1975); Commonwealth v. Perillo, 474 Pa. 63, 376 A.2d 635 (1977); Commonwealth v. Smith, 474 Pa. 559, 379 A.2d 96 (1977); Commonwealth v. Pugh, 476 Pa. 445, 383 A.2d 183 (1978); Commonwealth v. Roach, 477 Pa. 379, 383 A.2d 1257 (1978); Commonwealth v. Walters, 477 Pa. 430, 384 A.2d 234 (1978); Commonwealth v. Jones, 478 Pa. 172, 386 A.2d 495 (1978); Commonwealth v. Allen, 479 Pa. 342, 336 A.2d 965 (1978); Commonwealth v. Hitson, 482 Pa. 404, 393 A.2d 1169 (1978); Commonwealth v. Carrillo, 483 Pa. 215, 395 A.2d 570 (1978); Commonwealth v. Gamble, 485 Pa. 413, 402 A.2d 1032 (1979); Commonwealth v. Twiggs, 485 Pa. 481, 402 A.2d 1374 (1979); Commonwealth v. Hennessey, 485 Pa. 647, 403 A.2d 575 (1979); Commonwealth v. Gravely, 486 Pa. 194, 404 A.2d 1296 (1979); Commonwealth v. Hilhardt, 269 Pa. Super. 95, 409 A.2d 31 (1979); Commonwealth v. Tuc, 269 Pa. Super. 334, 409 A.2d 916 (1979).

Most significantly, although the following eleven grounds were submitted to this Court in written form as post-verdict motions, none of them were briefed or argued before it: (1) that the trial Court's final instructions pertaining to murder of the third degree and voluntary manslaughter were in error; (2) that the trial Court's requested supplemental jury instructions defining malice were incorrect; (3) that the trial Court erred in failing to specifically charge the jury in the language set forth in defense counsel's submitted points for charge pertaining to numerous issues; (4) that the trial Court committed reversible errors when it sustained the District Attorney's objections to various remarks in defense counsel's summation to the jury; (5) that the trial Court erred in overruling the defense demurrer to the criminal information pertaining to the drug charges in this case; (6) that the trial Court erred in permitting the District Attorney to question **Teri Price,** a Commonwealth witness, concerning whether or not he was selling drugs for the defendant; (7) that the testimony of Detective Volkmer concerning his search at defendant's residence was inadmissible since it arose from an invalid search warrant failing to allege sufficient probable cause information; (8) that the Court erred in allowing the District Attorney to question the defendant concerning the source of her bail money in this criminal proceeding; (9) that the Court erred in allowing the

(Footnote No. 1 is continued on Page 7.)

testifying as a Commonwealth witness, made potentially prejudicial references to the prior criminal record and other purported criminal activity of Ricardo McKendrick, her husband.[2] Both of the objected-to remarks were made during the course of Doris Everett's direct examination by the prosecutor. [N.T. p.p. 108-114]

The first of the challenged remarks occurred when the prosecutor was questioning Doris Everett about her deceased son's relationship with the defendant. The full pertinent record context in which the remark was made is as follows:

> "Q. And after that particular time did you have other occasions to talk to him about seeing Carolyn Swint McKendrick?
>
> A. Yes, I did.
>
> Q. Did you give him advice at that particular time about seeing Carolyn Swint McKendrick?
>
> A. Yes, I did.
>
> Q. What was that advice?

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(Footnote No. 1 is continued.)

District Attorney voir dire questioning of prospective jurors concerning capital punishment; (10) that the admission of items of bloodied clothing, various photographs, and the comments concerning same deprived the defendant of a fair and impartial trial; (11) that the trial Court erred in denying defense motions for mistrial interposed to allegedly prejudicial remarks of the prosecutor at various trial junctures.

Points of error which are raised in written post-verdict motions must be briefed or argued before the trial court to be preserved for appellate review. Commonwealth v. Williams, 476 Pa. 557, 383 A.2d 503 (1978); Commonwealth v. Holzer, 480 Pa. 93, 389 A.2d 101 (1978); Commonwealth v. VanCliff, 483 Pa. 576, 397 A.2d 1173 (1979); Commonwealth v. May, 485 Pa. 371, 402 A.2d 1008 (1979). Since these eleven reasons were neither briefed nor argued by defense counsel at the post-verdict stage, they are not viable appellate issues and will not be discussed in this Opinion.

2. Although this single assignment of error, in fact, encompasses grounds one and two set forth at the beginning of this Opinion as designated grounds preserved for appellate consideration,

(Footnote No. 2 continued on page 8.) 

A. He was going with Carol. I wouldn't say it was two years. I would say it was about a year and a half, not no two years. And in between that time I heard that her husband was in jail.

MR. SEROTA: Objection, sir, and move for a mistrial.

THE COURT: Sustain the objection. Deny the motion. [Italics added.]" [N.T. p. 108]

At this juncture, this Court denied defense counsel's motion for mistrial and immediately delivered the following cautionary instructions:

"The fact of the conviction of someone who is not here on trial is in no way to be a reflection on the defendant. It is obvious that she is on trial. You are to determine the defendant's guilt or innocence on the basis of this trial evidence, and do not assume the perspective of guilt by association. She stands here to be tried on the merits of her own case, not because she is related to someone that may possibly have a criminal record. That is most obvious to you. You are to disregard it."

[N.T. p.p. 108-109]

Upon further questioning on direct examination by the prosecutor, Doris Everett made the second of her challenged remarks which appears as follows in this record:

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(Footnote No. 2 is continued.)

it will be treated as one since the claims involve the same witness and substantially similar issues require discussion and analysis.

"Q. Mrs. Everett, do you know the husband of Carolyn McKendrick, a person by the name Ricardo McKendrick?

A. I know of him and I had him to my house but --

Q. When did you have him to your house?

A. When he came home.

Q. When was that?

A. I think it was in July of '76, somewhere around that time.

Q. And in July of '76, why did you have him at your house?

MR. SEROTA: Objection.

THE COURT: Overruled.

A. Well, from say-so, they said that her husband had a contract to have my son killed. [Italics added.]" [N.T. p. 109]

At this juncture, this Court once again denied defense counsel's motion for a mistrial and delivered the following cautionary instructions to the jury:

"Ladies and gentlemen of the jury, I am even hesitant to repeat the remark because, on a practical level, when you repeat a remark it may possibly be prejudicial and you may be worsening the problem, but I can't impart cautionary instructions under the law without repeating it. Those of much more wisdom, maybe, than I have said that you must specifically earmark your instructions and direct them to the remark that you are trying to remedy.

There was some reference to a contract out. You will recall the witness had made reference that she had heard. There is no direct evidence other than the general hearsay thing that she

might have heard in the neighborhood. That in and of itself would not be reliable.

I had previously instructed you that the purportedor the actual criminality of Ricardo McKendrick, the husband, is in no way to inflame your minds against the defendant. In plain, everyday parlance, maybe some of you have had the misfortune to have members of your family or loved ones to be convicted of a crime. That does not mean that the impropriety of the association or culpability of criminal character should be imposed upon you, to give you a concrete example from everyday life.

So you are not to infer any criminal conduct of Carolyn McKendrick with respect to the remark made by the witness. It is nothing to show any connection or complicity, if such a contract had been made, and there is no reliable evidence to establish it, that the defendant was in any way part of it and in association with it, had knowledge of it.

So you are, in effect, to ignore the remarks as if it had never been made, and you are to in no way cause that remark to inflame you in a prejudicial fashion against the defendant.

You are in no way to get the hint, the inkling, or the innuendo of any complicity of the defendant in such conduct, to wit, a contract to kill.

Lastly, forget that the remark was made. Erase it from your minds."

[N.T. p.p. 113-114]

Since both challenged remarks are quite similar in nature and were made in a quite close time sequence in the context of trial, it is submitted that they can both be analyzed and discussed jointly. In each instance, it is submitted that the sua sponte cautionary instructions from this Court served to

eradicate and expunge the potentially prejudicial impact of such challenged remarks upon the minds of the jury.

A trial court's use of curative instructions is an approved and encouraged practice which is normally adequate to remove the taint of prejudicial matters that are brought to a jury's attention. Commonwealth v. Starks, 479 Pa. 51, 387 A.2d 829 (1978). Generally, the standards used to determine the efficacy of cautionary instructions are that they be delivered promptly, that they be specifically tied to the potentially prejudicial fact or event, and that they be clearly and firmly worded to advise the jury that it must disregard the prejudicial event. Commonwealth v. Shoemaker, 240 Pa. 255, 87 A.684 (1913); Commonwealth v. Martinolich, 456 Pa. 136, 318 A.2d 680 (1974); Commonwealth v. Talley, 456 Pa. 574, 318 A.2d 922 (1974); Commonwealth v. Wiggins, 231 Pa. Super. 71, 328 A.2d 520 (1974). Upon a fair appraisal in the trial context, it is submitted that each of the cautionary instructions delivered by this Court, at the time of each of the challenged remarks, fully met these standards of efficacy, and consequently, they removed the taint of prejudice from the minds of this jury.

Further, the delivery of immediate and effective curative instructions has been held to be an efficacious remedy to cure the impact of sundry and various types of potentially prejudicial events; for example, Commonwealth v. Fugmann, 330 Pa. 4, 198 A.99 (1938) (prejudicial impact of erroneously admitted evidence remedied by curative instructions); Commonwealth v. Senk, 412 Pa. 184, 194 A.2d 226 (1963) (emphatic curative instructions cured

prejudicial impact of inadmissible evidence concerning defendant's prior imprisonment for unnatural sex relations); Commonwealth v. Beach, 445 Pa. 257, 284 A.2d 792 (1971) (prejudicial effect of defendant's unrelated conviction cured by prompt and explicit curative instructions); Commonwealth v. Williams, 470 Pa. 172, 368 A.2d 249 (1977) (prejudicial reference by a witness to the defendant's unrelated use of drugs cured by curative instructions); Commonwealth v. Brightwell, 479 Pa. 541, 388 A.2d 1063 (1978) (prejudicial impact concerning a question directed at defendant's failure to call a witness remedied by curative instructions); Commonwealth v. Tate, 458 Pa. 180, 401 A.2d 353 (1979) (prejudicial reference by a witness to defendant's use of drugs cured by curative instructions); Cf., Commonwealth v. McDuffie, 476 Pa. 321, 382 A.2d 1191 (1978) (failure of trial judge to strike and deliver immediate curative instructions at the time of receipt of prejudicial testimony from a witness warranted the grant of a new trial). A comparative analysis of this case with the train of cases cited clearly discloses that the instant remarks did not surpass the degree of potential prejudice of the types of remarks held to be curable by cautionary instructions. Moreover, as a distinguishing characteristic, the remarks in the cited cases were mostly directed at the defendant rather than a relative of the defendant, as occurred in this case. Thus, it is submitted that the instant cautionary instructions accomplished their aims of curing the potentially prejudicial impact of the remarks here challenged.

Finally, immediate and effective cautionary instructions have been held to be efficacious in remedying the potentially

prejudicial impact of improper conduct or remarks by testifying witness who are related or friendly to the victim or who are hostile to the defendant. Commonwealth v. Dolhancryk, 273 Pa. Super. 217, 417 A.2d 246 (1979); Also see, Commonwealth v. Flood, 302 Pa. 190, 153A. 152 (1930); Commonwealth v. Hawkins, 448 Pa. 206, 292 A.2d 302 (1972); Commonwealth v. Glover, 446 Pa. 492, 286 A.2d 349 (1972); Commonwealth v. Evans, 465 Pa. 12, 348 A. 2d 92 (1975). In this case, the jurors had enough common sense to comprehend that Doris Everett, the deceased's mother, would have venomed feelings toward the defendant and anyone related to her by either affinity or consanguinity. Further, there is not an iota of evidence to indicate that the jurors could not follow this Court's instructions that any possible criminal record of defendant's husband should not be imputed to her directly. Further, the jurors were quite capable of understanding that Doris Everett's testimonial reference to a "contract" was based on unreliable neighborhood hearsay and that there was no evidence connecting her to such an agreement, if it did exist. Moreover, since McKendrick herself later took the stand and admitted that she had fatally shot the deceased, this reference to a "contract" made by another could not have been as prejudicial as contended within the entire trial context. Lastly, this Court's admonition that McKendrick, "stands here to be tried on the merits of her own case" was clear and specific enough to be understood by every member of the jury.

Thus, McKendrick's first assignment of error must be rejected.

II.

McKendrick further complains that this Court erred in refusing her attorney's motions for mistrial in several instances in which Teri Price, a Commonwealth witness, testified that he had been administered polygraph or lie detector tests during police interrogation. A fair appraisal of this record will disclose that the three challenged references made by this witness that he had submitted to polygraph examinations constituted unprovoked, nonresponsive, and clearly unexpected answers to the prosecutor's questioning on direct examination.

Early in his direct examination, Price was questioned about the truthfulness of a contradictory statement he gave the police and answered, "The machine says I wasn't telling the truth." At this point, this Court denied a defense motion for mistrial. [N.T. p.p. 478-479]

Shortly thereafter, upon being presented a copy of a second inconsistent written statement taken by the police, Price abortively identified this statement by stating, "The second test I took." At this point, the defense objection was sustained. [N.T. p.p. 482-483] The record discloses that defense counsel did not make a motion for mistrial. A failure to request a mistrial even in trial circumstances where a defense objection is, in fact, sustained to potentially prejudicial trial occurrences means that such an issue is not preserved for appellate review. Commonwealth v. Hoskins, 485 Pa. 542, 403 A.2d 521 (1979). At the time of the happening of a possibly prejudicial event during the course of adversary trial proceedings, a defendant is only

entitled to receive that relief which his attorney has requested from the court. Commonwealth v. Glenn, 459 Pa. 545, 330 A.2d 535 (1974); Commonwealth v. Brown, 467 Pa. 512, 359 A.2d 393 (1976); Commonwealth v. Maloney, 469 Pa. 342, 365 A.2d 1237 (1976); Commonwealth v. Hill, 479 Pa. 346, 388 A.2d 690 (1978); Pa.R.Crim.P. 1118. Here, since defense counsel merely interposed an objection which was sustained and did not interpose a motion for mistrial, it is quite evident that, in this instance, he received only that relief requested. Consequently, this specific aspect of this assignment is waived.

Finally, the third and last challenged reference to a lie detector test was made when Price was questioned about a statement he made to the police concerning his acceptance of a drug delivery. In this context, Price answered, "No. The machine said it was untrue." Here, once again, this Court denied defense counsel's motion for a mistrial.[3] [N.T. p.p. 490-491]

Additionally, at this juncture and on its own motion, this Court delivered the following cautionary instructions to the jury:

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3. During the course of his own cross-examination of Price, defense counsel elicited three additional answers which made reference to a lie detector test, such as, "Oh, the test," "my first test," "first two tests." [N.T. p.p. 551, 558, 579] Defense counsel is correct in not asserting these three grounds as part of this assignment of error. First, he himself elicited them on cross-examination. Commonwealth v. Camm, 443 Pa. 253, 277 A.2d 325 (1971). Second, due to the absence of a contemporaneous objection in each of the three instances, they are not issues preserved for appellate review. Commonwealth v. Farquharson, 467 Pa. 50, 354 A.2d 545 (1976); Commonwealth v. Pritchett, 468 Pa. 10, 359 A.2d 786 (1976); Commonwealth v. Griffin, 271 Pa. Super. 228, 412 A.2d 897 (1979).

> "The obvious reference -- obviously the machine would be a lie-detector test. You are to completely disregard any reference to a lie-detector test. You judge this witness' credibility or believability or lack of believability, which is in your sole discretion, from what you are hearing and watching as he is testifying.
>
> You are the truth determiners, not any testing.
>
> As to the reference by the witness, the witness doesn't know the admissible from the inadmissible. The witness is as you all are, a layman. Don't derive any prejudicial reference as the result of his testimony." [N.T. p. 491]

Since only two of Price's testimonial references that "The machine says I wasn't telling the truth" and that "No. The machine said it was untrue" to have taken a lie detector test are presently viable appellate issues, our discussion and analysis will be limited to them.

At this time, it is the well-established law of Pennsylvania that the results of a polygraph examination are inadmissible evidence for all purposes because the scientific accuracy, reliability, and validity of such tests have not been sufficiently and adequately established.[4] In fact, the Pennsylvania evidentiary

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4. There is a long train of cases in support of this proposition; for example, Commonwealth v. Saunders, 386 Pa. 149, 125 A.2d 442 (1956); DeVito v. Civil Service Commission, 404 Pa. 354, 172 A.2d 161 (1961); Commonwealth v. Johnson, 441 Pa. 237, 272 A.2d 467 (1971); Commonwealth v. Camm, 443 Pa. 253, 277 A.2d 325 (1971); Commonwealth v. Brooks, 454 Pa. 75, 309 A.2d 732 (1973); Commonwealth v. Talley, 456 Pa. 574, 318 A.2d 922 (1974); Commonwealth v. Gee, 467 Pa. 123, 354 A.2d 875 (1976); Commonwealth v. Cain, 471 Pa. 140, 369 A.2d 1234 (1977); Commonwealth v. Kemp, 270 Pa. Super. 7, 410 A.2d 870 (1979); Commonwealth ex. rel. Riccio v. Dilworth, 179 Pa. Super. 65, 115 A.2d 865 (1955); Commonwealth v. McKinley, 181 Pa. Super. 610, 123 A.2d 735 (1956); Commonwealth ex. rel. Hunter v. Banmiller, 194 Pa. Super. 448, 169
(Footnote No. 4 continued on page 17)

rule barring the results of a lie detector test or polygraph examination has been quite broad in its application under the case law. Testimony of an accused's willingness to take a test to establish his consciousness of innocence is inadmissible. Commonwealth v. Saunders, supra. The defendant may not introduce this type of incompetent evidence aimed at establishing his innocence. Commonwealth v. Brooks, supra; Commonwealth v. Talley, supra. Equally as well, it is improper for the Commonwealth to introduce such evidence for the purpose of establishing the defendant's guilt. DeVito v. Civil Service Commission, supra; Commonwealth v. Camm, supra. A close analysis of this line of cases which dictate the grant of a mistrial in trial instances in which there have been prohibited references to a polygraph examination discloses that they are specifically and solely directed to such references that pertain to the defendant which could give rise to inferences of either his guilt or innocence. Commonwealth v. Camm, supra; Commonwealth v. Garland, supra; Commonwealth v. Johnson, 273 Pa. Super. 14, 416 A.2d 1065 (1979). Since the two challenged references to lie detector tests merely implicated the credibility of Teri Price as a Commonwealth witness, and they did not pertain to either McKendrick's guilt or innocence, the teachings of the line of cases that a mistrial

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(Footnote 4. is continued.)

A.2d 347 (1961); Commonwealth v. Chapman, 255 Pa. Super. 265, 386 A.2d 994 (1978); Also see, Wharton's Criminal Evidence §630 (13th Ed. by C.E. Torcia, 1973).

was warranted are inapposite to this case.

The prejudicial effect of remarks made by a witness must be measured in the trial context in which they were made. Commonwealth v. Stoltzfus, 462 Pa. 43, 337 A.2d 873 (1975); Commonwealth v. Perillo, 474 Pa. 63, 376 A.2d 635 (1977). However, it is not every remark, statement, or comment by a witness, even if unwise, irrelevant, or prejudicial which warrants a new trial, but the language must be such that its unavoidable results would be to prejudice the jury, forming in their minds fixed hostility and bias toward the accused, so that they cannot weigh the evidence and render a true verdict by an objective determination. Commonwealth v. McNeal, 456 Pa. 394, 319 A.2d 669 (1974); Commonwealth v. Rolison, 473 Pa. 261, 374 A.2d 509 (1977); Commonwealth v. Starks, 479 Pa. 51, 387 A.2d 829 (1978); Commonwealth v. Brown, 489 Pa. 70, 414 A.2d 70 (1980). Here, Price's remarks concerning his own submissions to polygraph examinations merely had a possible impact on his own believability as a witness, and, in no way, eroded the presumption of innocence accorded McKendrick in the minds of this jury. Further, Price's remarks did not affect the objective determination of McKendrick's guilt by this jury. In fact, as will be discussed, Price's own reference to the lie detector tests probably served as negative factors which influenced this jury to disbelieve him.

Further, a close perusal of Price's testimony would disclose that he was a psychologically abnormal, emotionally distraught, and possibly intimidated Commonwealth witness. By fair appraisal, Price's prohibited references to the lie detector tests were unprovoked, unin.stigated, and perhaps unwanted nonresponsive answers

to proper questions on direct examination put to him by the prosecutor. In this case, the prosecutor was not guilty of any wrongful conduct instrumental in bringing about the prohibited responses from Price, an admitted homosexual who cried, trembled, and shook as he testified in the witness box. Thus, this case was not an instance in which the Commonwealth intentionally violated evidentiary rules by utilizing polygraph testing results for the purpose of rehabilitating the credibility of one of its witnesses on redirect examination. Commonwealth v. Johnson, supra; Commonwealth v. Kemp, supra.

Further, in the trial context, it is submitted that Price's admissions that he had twice lied to the police, thereby requiring polygraph examinations, served to erode his credibility and to help the defendant. As is more fully discussed in Part III, infra of this Opinion, Price's credibility was impeached by the use of various impeachment techniques: (1) the use of two inconsistent statements he had made to the police; (2) the admitted grant of immunity given to him by the prosecution in exchange for his testimony; (3) the use of inconsistent statements given during an interview with defense counsel; (4) the use of inconsistent statements which he had made as a Commonwealth witness at the preliminary hearing in this case. Thus, when weighed in the full context of his trial testimony, Price's references to the need for police-administered polygraph examinations could only serve to impress the jury of the fact that he was a potentially mendacious witness who also was disbelieved by the police. Admittedly, the reference

to lie detector tests could have served to bolster the credibility of two consistent statements given by Price subsequent to testing. These two consistent statements were used by the prosecutor to rehabilitate Price on redirect examination. [Sec, Exhibits C-36 and C-37] However, the references to the polygraph did create a juror image to the effect that the police found Price to be an extrajudicial liar. In fact, defense counsel also agrees with this Court's appraisal of Price as an unworthy and discredited witness. Defense counsel's appraisal of Price's testimony is found in his written Brief in support of post-verdict motions, as follows: "The prosecution's star witness, and the only eye-witness beside defendant, was not only thoroughly impeached during cross-examination, but impeached himself by giving at least four different accounts of what had transpired on the day in question. ... his testimony was contradicted and he was impeached..." [Defense post-verdict Brief at pages 12-13]

Finally, this Court's cautionary instructions that the jury was to disregard the reference to a lie detector test, that credibility was a sole jury function, and that the prejudicial reference was to be ignored served to erase any prejudice in the minds of this instant jury. Upon a fair appraisal in the trial context, such instructions were specifically tied to the prejudicial remarks, were promptly given, and were clearly and firmly worded to advise the jury that such remarks were to be disregarded. Commonwealth v. Shoemaker, supra; Commonwealth v. Martinolich, supra; Commonwealth v. Talley, supra; Commonwealth v. Wiggins, supra.

Consequently, this second assignment of error is meritless.

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